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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDDY CASIAS,

Defendant and Appellant.

H042065

(Santa Clara County

Super. Ct. No. C1369155)

After the electorate approved Proposition 47 in November 2014, defendant Freddy Casias brought a petition to reduce his conviction for vehicle theft with a prior conviction (Veh. Code, § 10851; Pen. Code, § 666.5) to a misdemeanor and be resentenced accordingly. The trial court denied the petition. On appeal, defendant contends that the voters intended that Proposition 47 would apply to the theft of a vehicle valued at no more than \$950. He also contends that his felony conviction violates his right to equal protection. We affirm the order because defendant failed to show that the value of the vehicle did not exceed \$950.

I. Statement of the Case

In February 2014, defendant pleaded no contest to vehicle theft with a prior conviction, possession of a controlled substance (Health & Saf. Code, § 11377,

subd. (a)), and using or being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). Defendant also admitted the allegations that he had three prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and had served three prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court sentenced defendant to four years in state prison.

In January 2015, defendant brought a petition for resentencing. About a month later, the trial court concluded that a Vehicle Code section 10851 conviction was not affected by Proposition 47 and denied the petition as to that conviction. However, the trial court granted the petition as to his conviction of possession of a controlled substance.

II. Statement of Facts

The complaint alleged that on November 4, 2013, defendant committed vehicle theft with a prior conviction when he drove and took a 1995 Oldsmobile Cutlass, which belonged to Mauricio Gutierrez. It was further alleged that the vehicle was taken and driven without Gutierrez's consent and with the intent to deprive him of title to and possession of the vehicle.

At the sentencing hearing, defendant was ordered to pay \$1,217.97 in restitution to Gutierrez.

III. Discussion

Proposition 47 established procedures for petitions for reduced sentences for specified nonserious and nonviolent property and drug crimes by adding Penal Code section 1170.18. This statute provides in relevant part: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence

before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.” (Pen. Code, § 1170.18, subd. (a).) Penal Code section 1170.18, subdivision (b) provides that a court that receives such a petition shall resentence the petitioner “unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

Though Penal Code section 1170.18 does not refer to Vehicle Code section 10851, defendant argues that “the voters intended Vehicle Code section 10851 to come under the provisions of Proposition 47.” He points to Proposition 47’s addition of Penal Code section 490.2, which states in relevant part: “Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor” (Pen. Code, § 490.2, subd. (a).) Thus, he argues that all thefts of property, including violations of Vehicle Code section 10851, with a value less than \$950 are characterized as petty thefts under Penal Code section 490.2.

The Attorney General responds that defendant was convicted of vehicle theft (Veh. Code, § 10851) with a prior felony conviction of vehicle theft (Pen. Code, § 666.5). She points out that while Penal Code section 666¹ was included in Penal Code section 1170.18, subdivision (a), Penal Code section 666.5 was not. Thus, she argues that since

¹ Penal Code section 666, subdivision (a) provides that any person with a prior violent or serious felony conviction “who, having been convicted of . . . auto theft under Section 10851 of the Vehicle Code . . . , and having served a term of imprisonment therefor in any penal institution . . . and who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.”

Penal Code section 666.5² was not among the statutes listed as amended or added by Proposition 47, defendant was ineligible for resentencing.

We need not resolve this issue, because, even assuming that defendant's argument has merit, he has failed to establish that he was entitled to relief.³

"The very settled rule of appellate review is a trial court's order/judgment is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record. [Citations.]" (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.)

"[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878.) If the crime under consideration is a theft offense, "the petitioner will have the burden of proving the value of the property did not exceed \$950." [Citation.]" (*Id.* at p. 879.) The petitioner for resentencing has the "initial burden of proof" to "establish the facts upon which his or her eligibility is based." (*Id.* at p. 880.)

Here, defendant's petition did not include any information as to the value of the stolen vehicle. He argues in his reply brief that the record establishes that the vehicle was approximately 18 years old when it was taken and thus "it is reasonable to infer that the car would be worth less than \$950." Defendant's argument is not evidence. Moreover,

² Penal Code section 666.5, subdivision (a) provides in relevant part: "Every person who, having been previously convicted of a felony violation of Section 10851 of the Vehicle Code [theft and unlawful driving or taking of a vehicle], or felony grand theft involving an automobile in violation of subdivision (d) of Section 487 . . . , or a felony violation of Section 496d regardless of whether or not the person actually served a prior prison term for those offenses, is subsequently convicted of any of these offenses shall be punished by imprisonment pursuant to subdivision (h) of section 1170 for two, three, or four years"

³ The issue of whether Proposition 47 applies to convictions of Vehicle Code section 10851 is currently pending before the California Supreme Court in *People v. Page* (2015) 241 Cal.App.4th 714, review granted, January 27, 2016, S230793.

the trial court ordered defendant to pay the victim \$1,217.97 in restitution. As defendant points out, the record does not disclose whether the restitution order included compensation for the value of the stolen property, repair costs, or lost wages. (Pen. Code, § 1202.4, subd. (f)(3).) Nevertheless, we cannot assume error. Since defendant failed to meet his burden of proving that the value of the vehicle did not exceed \$950, the order must be affirmed.

IV. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

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